

# VERDICT

LEGAL ANALYSIS AND COMMENTARY FROM  
JUSTIA

## The Illinois Bivens Act: A Timely and Productive, If Imperfect, Experiment in Converse-1983 Laws That States Can and Should Enact

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Late last month, both houses of the Illinois legislature

passed the so-called Illinois Bivens Act, an important and innovative law in keeping with the proudest tradition of federalism, a tradition in which federal and state governments check and balance each other to keep everyone in line with the Constitution. Given that, and all things considered, we hope the governor signs the law into effect. (In Illinois, the governor has 60 days to decide whether to sign or veto a bill.) Having said that, we quickly add that there are a number of facets of the Illinois Bivens measure that we wish were different, and that there are portions of the larger bill of which the Bivens Act is a part that will almost certainly fail to survive federal constitutional challenge.

To begin with, a bit of general background and a few words about what the Illinois Bivens Act does. To protect victims of actions by government officials that violate the U.S. Constitution, Congress and the Supreme Court have devised several remedies. For prospective—that is, not-yet-transpired-but-reasonably-likely-to-happen—constitutional violations, there is the famous *Ex Parte Young* device. Named after the 1908 *Ex Parte Young case*, this device

permits a challenger to sue the government official (state *or* federal) who is responsible for enforcing an allegedly unconstitutional law or policy, and to obtain from a federal court a forward-looking injunction preventing what would be a future constitutional violation. The *Ex Parte Young* doctrine is sometimes referred to as the *Ex Parte Young* “exception” because the doctrine effectively removes cases in which the device is employed from the general rule of sovereign immunity—the (constitutionally misbegotten but entrenched) notion that both federal and state governments are immune from suit unless they have consented. Technically, *Ex Parte Young* explains itself not as an exception to sovereign immunity, but rather a circumvention of it, since a government official defendant is deemed to be distinct from the government itself. That leads to a second common characterization of *Ex Parte Young*—as a “fiction.” This label is apt because although the suit against the official is deemed not to be (and is different from) a suit against the government itself, if the official who is being sued under *Ex Parte Young* leaves office (for whatever reason), the lawsuit continues against her successor without the need for the plaintiff to initiate a new action. This automatic substitution

of new officeholders for departed ones makes clear that the suit can't meaningfully be understood as being against the individual official herself, but at a minimum must be thought of as being against *the office* she holds.

Distinguishing between the government as an abstract entity and an identifiable, real, individual defendant is one thing. But distinguishing a suit against *the government* (which is forbidden) from a suit against a *government office* (which is effectively permitted under *Ex Parte Young*) is slicing the onion awfully finely, even for us constitutional lawyers.

As noted above, *Ex Parte Young* is importantly limited to forward-looking relief. But what about compensation for victims of government-sponsored unconstitutional actions that have already occurred? Here, both Congress and the Supreme Court have gotten into the act. Shortly after the Civil War, Congress passed a (famous) federal law, 28 U.S.C. § 1983, that provides a cause of action (including for damage relief) against *state* officers (i.e., persons who act under “color of state law”) who violate the federal Constitution. Given that in the 1860s and 1870s state officials (especially in the South) were rightly viewed as the biggest threats to

constitutional rights, § 1983's focus makes historical sense. But what about unconstitutional actions by federal officials? Congress, interestingly enough, has never passed a federal statute analogous to § 1983 that imposes damage liability on federal officers. That's where Bivens actions come in.

Traditional Bivens actions are named after a famous 1971 Supreme Court Case, *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*. In that ruling, involving the warrantless entry and search of a person's apartment leading to a narcotics arrest, the Supreme Court recognized a damage cause of action against federal agents who violate the Constitution *under the Constitution itself* (in *Bivens*, the Fourth Amendment), without the need for a congressional enactment authorizing such suits. Although the action arises directly under (at least some provisions of) the Constitution despite the absence of any congressional enactment, the Court has made clear in subsequent cases that Congress can, if it chooses, displace the constitutional cause of action and can do so even without providing an equivalent statutory substitute. So under the *Bivens* case and subsequent Supreme Court cases refining it, compensatory damages are

not available to victims of federal lawlessness as a matter of course, but instead exist largely at the will of Congress. Congress might even be able to eliminate entirely Bivens claims and leave victims of constitutional violations by federal officers with no federal remedy at all.

The Illinois Bivens Act seeks to step into this remedial void, by providing a *state-law* damage cause of action against federal officials who, when undertaking certain federal enforcement activities, violate the U.S. Constitution—a cause of action that presumably *cannot* be preempted by federal law unless Congress passes a substitute statute that provides at least as much redress as the Illinois Act does. That, we think, is a step in the right direction, and one we hope Governor JB Pritzker will also appreciate when he decides whether to sign the bill into law.

We take a bit of particular joy in seeing Illinois pursue this state-law, statutory complement to *Bivens*. For starters, the intellectual architect of state laws like this is Professor Akhil Amar (older brother and frequent co-author of one of us; friend and teacher of the other of us). In introducing the idea in a seminal 1980s **law review article** Akhil called the device

not a state-law Bivens device but a “converse-1983” device. Like § 1983, it would provide damage relief against lawless government officials; it would be “converse” in the sense that § 1983 is a *federal* statute seeking to regulate *state* officials while the new device would involve *states* seeking to rein in *federal* lawlessness. Two decades ago, Vik **in his own law scholarship** built on the elder Professor Amar’s converse-1983 work (writing, coincidentally, for a symposium that Jason, then a brand-new law professor, planned and hosted). And fast forwarding, this past spring, the two of us (Vik and Jason) participated in a Zoom event (organized by Jason) exploring state government responses to some of the policies and activities of the Trump administration, where Vik discussed the converse-1983 concept and its potential benefits. Among the other participants was none other than Illinois Attorney General Kwame Raoul, who seemed particularly intrigued by the converse-1983 idea. We don’t know exactly what role AG Raoul played in helping bring about the Illinois legislature’s passage of the Illinois Bivens Act, but we do hope his evident interest in this topic was shared with his Democratic colleagues in Springfield.

Astute readers may ask: Are converse-1983 laws by states constitutionally permissible? It is one thing for Congress to regulate states, but doesn't the Supremacy Clause and the famous *McCulloch v. Maryland* case prohibiting Maryland from taxing the U.S. prevent states from regulating officers or operations of the federal government? Not at all. A crucial premise of the converse-1983 device is the notion that state laws regulating federal activities are *not* preempted when the federal activities are themselves beyond the bounds of the Constitution.

In *McCulloch*, Maryland believed that the Second Federal Bank was unconstitutional in that Congress had no enumerated power to create such a bank; and that the bank's federal charter was thus unlawful. Maryland proceeded to impose upon the bank a tax, and when the bank officials refused to pay, Maryland brought suit in its own state courts against a bank official, asking for a fine against him for his failure to comply with the Maryland law. The state courts ruled in favor of Maryland. On appeal, the U.S. Supreme Court unanimously reversed. Akhil has succinctly explained why this decision does not preclude converse-section 1983-

suits against federal officers for violating the Constitution:

[T]he Supreme Court [in *McCulloch*] nowhere denied the legitimacy of the jurisdiction exercised by the state court below in an action for damages, of sorts, against a federal official alleged to be part of an unconstitutional federal operation. Note also how the Supreme Court structured its analysis in *McCulloch*. The first question, said the Court, was whether the bank was in fact constitutional. Only after assuring itself that the bank was indeed consistent with the federal Constitution—“necessary and proper”—did the Court address what it labeled as the second question in the case: whether the state of Maryland could nonetheless impose its tax. The structure of the Court’s analysis and several passages in the opinion plainly imply that if the bank had indeed been unconstitutional, perhaps state law could impose liability on the bank official, Mr. McCulloch. If anything, all this suggests that when federal officials are acting in violation of the federal Constitution, state law-created liability may well be appropriate at times.

Of course, if a state converse-1983 law were to provide for liability far in excess of making a plaintiff whole, and far in excess of the quantum of damages for other state causes of action, this punitive converse-1983 law might offend the spirit of *McCulloch*. Imagine, for example, a converse-1983 law that provided for one million dollars of presumed damages for any Fourth Amendment violation by federal officials, however technical the violation and however minimal the actual harm to Fourth Amendment values of property, personhood, and privacy. This presumed damage rule could well be seen as a tax masquerading as a remedy, and thus violative of *McCulloch*'s spirit.

As Vik has explained in detail, the centrality of the first part of *McCulloch* (that the bank is constitutional) in reaching the result in the second part (that the tax is *unconstitutional*) has itself been recognized and repeated by members of the Court over the past few decades. Most directly, in *U.S. Term Limits, Inc. v. Thornton*, Justice Clarence Thomas in dissent argued in favor of a state's ability to regulate federal officials

—in that case, the power of a state to prescribe qualifications for persons from the state to be elected to Congress. Justice Thomas (whose dissent was not challenged by the majority on this point) observed that the “structure” of *McCulloch*’s analysis was set up such that “Chief Justice Marshall’s opinion *began* by upholding the federal statute incorporating the bank. It *then* held that the Constitution affirmatively prohibited Maryland’s tax on the bank created by this statute” (emphasis added).

As Justice Thomas went on to explain, it was the *McCulloch* Court’s view that “*when* a power has been ‘delegated to the United States by the Constitution,’ . . . the Supremacy Clause forbids a State to ‘retard, impede, burden, or in any manner control, the operations of constitutional laws enacted by Congress’” (emphasis added). Thus, according to Justice Thomas, Maryland’s lack of power turned on the existence of federal power to enact the policy in question.

This seemingly simple point has not been deeply enough appreciated, even though it underlies all federal preemption doctrine, not just cases dealing with so-called intergovernmental immunity (i.e., cases involving laws by

one governmental entity regulating another). For example, when we decide whether federal policy preempts a state law regulating private businesses or private citizens, we ask first whether the federal policy is constitutional. If not, then there is no federal policy to do any preempting. Even in the field of foreign affairs preemption, where the Court has said (perhaps too absolutely) that states have little role to play, the Court first asks in each case whether the allegedly preempting federal decision to regulate is itself a valid exercise of the federal government's powers.

Indeed, in *Thornton* Justice Thomas indicated that his reading of *McCulloch*—as a species of preemption doctrine more generally—has been embraced by the Court for over 175 years. And it makes perfect sense to think of *McCulloch* as just one example of preemption more broadly. Most of the time federal preemption is asserted, the question presented is whether state laws are regulating private persons in a way different from that preferred by Congress. But whether states regulate *private persons* in a way that the federal government does not like, or whether the states regulate the *federal regulators themselves* in a way that bothers the

federal government, federal objectives are equally frustrated.

Federal instrumentalities—be they statutes, banks, legislators, or executive officers—exist under our system of government only to pursue federal policies on behalf of the national populace; they are means to various ends, not ends in themselves. If we do not preempt state regulation of private parties that is inconsistent with congressional desires except when those congressional desires are themselves constitutionally permissible—and we do not—then we should not preempt state regulation of federal entities when those entities are engaged in constitutionally impermissible activities.

So far, so good. Now back to the Illinois Bivens Act with which we began. Five things about it give us some pause.

First, the Illinois Bivens Act is insufficiently ambitious in that it recognizes and preserves the defense of so-called qualified immunity enjoyed by official defendants. That means that a plaintiff can't prevail simply because the defendant violated the plaintiff's constitutional rights; for liability to attach, the court must also find that the

constitutional law was sufficiently clear that a reasonable official would have *known* that what the defendant did would be deemed unconstitutional. Thus, in settings where the Supreme Court hasn't yet clarified what the Constitution requires, defendants often avoid damage liability.

Qualified immunity doctrines have been accepted as part of the § 1983 and traditional (as opposed to state-created) Bivens actions, but many proponents of converse-1983 devices (ourselves included) would hope that states pursuing converse-1983 laws would not follow Congress's and the Supreme Court's lead here. Indeed, this is one place where converse-1983 devices can be significantly better than traditional Bivens claims or regular § 1983 claims. In practice, qualified immunity leaves many victims of constitutional violations holding the bag because constitutional principles quite often have not been fully clarified by courts prior to the time the defendant acts. We sympathize with defendant officials who act reasonably at the time but in ways that turn out to be unconstitutional; they should not be left paying for the costs of doing government work. But neither should the victims. Instead,

the costs of government mistakes should be borne by the government (i.e., the people) more generally, who would (if qualified immunity were removed) be forced to indemnify official defendants lest no one would work in the public sector. And although qualified immunity is recognized in § 1983 and traditional Bivens actions, there is no convincing argument that qualified immunity is itself commanded by the Constitution: Congress could eliminate it and so too, we think, could states.

The Illinois Bivens Act is unduly narrow in a second way: the damage actions it authorizes are limited to claims against persons who “participat[e] in civil immigration enforcement.” Why does the limitation to immigration matter? ICE might be the poster child for federal excess from the point of view of many blue states in 2025, but a more general state Bivens/converse-1983 Act for *all* constitutional violations by federal actors would make considerably more sense. It would have broader relevance and therefore broader political appeal: today ICE is the focus but under a future administration it might be ATF agents violating Second Amendment rights whose misconduct cries out for

remedy. Moreover, states that adopt more general converse-1983 laws look like they are genuinely seeking to vindicate the principle that constitutional rights deserve remedies, rather than trying to impede particular immigration policies with which they disagree.

Third, just as the Illinois Bivens Act is in some respects too narrow (retaining qualified immunity and focusing only on immigration enforcement), it is also overly broad, insofar as it purports to subject federal officials to liability for violating not just the federal Constitution, but also the Illinois state constitution. That provision won't stand. Laws and policies of the federal government that comply with the federal Constitution are supreme over anything in state law, including state constitutions. Actions by federal officials that do not violate the federal Constitution cannot be burdened by unwanted state regulation. As *McCulloch* clearly teaches, Illinois cannot regulate federal operations directly (the way the Illinois Bivens Act does) *unless* either Congress consents (which it hasn't) or the federal actors lack the protection of the Supremacy Clause, and the latter is true only when the federal actors are themselves exceeding the bounds of

federal constitutional power.

Fourth, the Illinois Bivens Act purports to go beyond compensating victims to provide (albeit with some limiting factors) for punitive damages against federal officials who enforce immigration law. That strikes us as potentially problematic. It raises the possibility that Illinois is going beyond enforcing the federal Constitution—by fully compensating victims of constitutional violations—to instead imposing what amounts to a tax upon the federal government more generally. Or at least courts could see it that way. And insofar as the converse-1983 action concept might seem edgy enough to many people, we think this is one area where caution by states is warranted.

Fifth, and related, the Illinois Bivens Act is part of a larger bill that includes other provisions that clearly run afoul of principles of supremacy. One notable instance: the bill that houses the Illinois Bivens Act purports to make it illegal for federal immigration officers to arrest people within 1,000 feet of a courthouse. We understand why Illinois does not want individuals to fear attending court, but the state cannot address that concern by a buffer zone that excludes federal

officers from public courthouses. Unless and until federal immigration officials violate the Tenth Amendment or some other provision in the Constitution, they are free to make arrests pursuant to federal policies (in courthouses and other public locations) even if states don't like such policies. As one of us (Vik) has explained in [a recent \*Verdict\* column](#) and longer scholarly commentary, states can't, absent congressional consent, directly regulate federal agents while those agents are on the job enforcing contentious but constitutionally permissible federal laws. (This is true even if, as is the case with the Illinois Bivens Act, state officials are being regulated alongside federal officials) And there is nothing to indicate Congress wants ICE officials to have to comply with state laws regarding where arrests can or cannot be made.

At the end of the day, the parts of the bill housing the Illinois Bivens Act that violate federal supremacy will either be severed (in which case the good parts of the bill will remain intact), or they won't be severed (in which case the whole law, including the Illinois Bivens Act) will be invalidated and Illinois lawmakers will have to go back to the drawing board.

Either way, things won't be any worse than they are today, and they could well be better. We would have preferred a more thoughtful, balanced and well-crafted version of converse-1983 to be proposed and enacted, but the historical laboratory of federalism is full of helpful yet imperfect experiments in the early stages of a reform movement. Illinois's law, if enacted, will, we hope, help other states adopt even better implementations of the converse-1983 idea.

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